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No. 861

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,

Petitioner,

vs.

EFRAIN SANTOS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT SANTOS IN OPPOSITION

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Opinion Below

The Opinion of the Court of Appeals is reported as *Santos v. United States*, 417 F.2d 340.

Jurisdiction

The judgment of the Court of Appeals was entered August 19, 1969. The government filed no petition for rehearing. It filed its petition for a writ of certiorari on November 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Was respondent's Fifth Amendment privilege violated when the same indictment charged him under 26 U.S.C. 4742(a) and 4744(a)?

2. Although the Court of Appeals did not pass upon the question of claimed ineffective assistance of counsel, because of reversal on other grounds, ought this Court finally conclude the limited issue presented by the government without remanding to the Court below for consideration of other issues raised?

3. Is this the proper case to determine the retroactivity issue?

STATEMENT

Respondent accepts petitioner's Statement of the Case.

Argument

Two reasons are presented in support of the government's request for a writ of certiorari: (1) inasmuch as this Court has decided *Buie* v. *United States* ..... U.S. ....., 24 L.ed 2d 283 (No. 271, December 8, 1969) adverse to defendant and sustained the validity of 26 USC 4742(a), it is argued that certiorari should be granted to reverse the decision of the court below; and (2) irrespective of the result in *Buie*, it is further and alternatively argued that this court should grant certiorari to determine the retroactivity of *Leary* v. *United States*, 395 U.S. 6 and *Covington* v. *United States*, 395 U.S. 57. (Petition, pp. 5-6).

Respondent, Santos, respectfully submits that neither reason supports granting of the writ under the peculiar factual circumstances present in the instant case.

1.

As defendant was charged in the same indictment with violation of both 4742(a) and 4744(a), Title 26, U.S.C. it is clear that his Fifth Amendment privilege against self-incrimination was effectively violated.

Respondent submits that certiorari should be denied because joinder of a charge of violation of 26 U.S.C. 4744(a) (1) with a charge of violation of 26 U.S.C. 4742(a) effectively violated defendant's Fifth Amendment privilege against self-incrimination within the meaning of *Leary*, because under section 4744 (a) (1), he was required to expose himself to the authorities as a possessor of marijuana, thereby incriminating himself under both statutes named in the indictment.

Defendant was charged as a transferee in violation of 26 U.S.C. 4744 (a) (1) (by being a transferee who failed to pay the tax) and as a transferor in violation of 26 U.S.C. 4742(a) (by being a transferor not in pursuance of a written order form). Appreciating the significance and important distinction, recognized in and underlying this Court's decision in *Buie* between a transferee and a transferor (who is not, according to *Buie*, required to incriminate himself because the buyer, not the seller, is required to obtain the order form), petitioner submits this distinction is of no legal or constitutional significance in the instant case, because respondent was charged as *both buyer and seller in the same indictment.*

The importance of the joint charge in the instant case — as compared to a violation of 4742(a) alone, in *Buie* — is best and readily appreciated by a reading of *Leary.* In *Leary,* this Court held that petitioner's Fifth Amendment privilege was violated because to comply with the statutes there in question (26 U.S.C. 4741(a) and 4744(a)), petitioner would have to provide "a significant 'link in a chain' of evidence tending to establish his guilt." *Leary* v. *United States,* 395 U.S. 6, 16. (quoting *Marchetti* v. *United States,* 390 U.S. 39, 48). In other words, petitioner in *Leary,* who as an unregistered possessor of marijuana was part of a "selective group inherently suspect of criminal activities," would be required by compliance with the statute, " . . . unmistakenly to identify himself as a member of this 'selective' and 'suspect' group." The "real and appreciable" hazard of incrimination (*Leary,* p. 18) of course, resulted from the fact that petitioner must disclose his identity as a "suspect" possessor of marijuana.

Turning to the facts of the instant case, it is obvious that as respects one count of the indictment, charging respondent Santos with a violation of 4744(a) (1), a simi-

lar real and appreciable hazard of self-incrimination and exposure as a violator of that statute existed by virtue of the disclosure requirements, and the court below, applying *Leary* correctly, reversed the judgment of conviction under that statute.

But how could Santos in the instant case expose himself as a violator of 4744(a) (1) without also exposing himself as a violator or potential violator of 4742? The risk of *exposure* as a violator of both Sections in the instant case, of course, results from the fact that Santos was charged with a violation of both statutes.

We submit that the significant factor in *Leary* (a factor totally absent in *Buie*) was the risk of exposure by the requirement that Santos identify himself as a transferee not necessarily exposure as a violator of a particular federal statute — but exposure as a violator of any one of the federal — and for that matter State* — laws governing the sale and purchase of marijuana. Applying the exposure criterion to the instant facts and reading the indictments as a whole as it must be read,** it is apparent that in *Buie* there was no risk or requirement of exposure, whereas in *Leary* and the instant case there was.

The importance of consideration of the entire indictment is apparent from the emphasis placed in both *Leary* and by the court below upon the "statutory scheme" of the marijuana laws. Where, as here, the "scheme" results in a Fifth Amendment violation, the conviction must be reversed.

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* Cf. *Marchetti* v. *United States*, 390 U.S. 39, 44-48.

** Importantly, in this context, is the fact that the government drew the indictment and therefore placed petitioner in the position where, to comply with 4744(a) (1) he must have necessarily incriminated himself as to 4742(a), as well.

Accordingly the court below, admittedly using different reasoning, reached the correct result in reversing defendant's judgment of conviction on all counts. The petition for a writ of certiorari should therefore be denied.

In the event this court rejects the position here taken, we submit the judgment of the Court of Appeals should not be summarily reversed on the basis of *Buie*, but that the issue here raised should be argued to the Court.

2.

Independent grounds for reversal of original conviction.

Respondent presented to the Court of Appeals a separate and distinct argument — based on ineffective assistance of counsel—which the Court of Appeals explicitly found it unnecessary to consider.* To assure full review of this issue in the event this Court agrees with the government that the petition should be granted, it is respectfully requested that the judgment not be summarily reversed, but that the same be vacated to allow consideration of the other issue presented to the court below.

3.

This is not a proper case for determination of the retroactivity issue which in any event has been correctly determined in favor of retroactivity.

This case — not involving the statutes held unconstitutional in *Marchetti, Grosso* and *Haynes*** —is clearly not a proper vehicle for determining the retroactivity of those decisions, whose retroactivity is best determined by cases

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* See 417 F. 2d 340, 342, n. 1.

** *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; *Haynes* v. *United States*, 390 U.S. 85.

arising specifically under the statutes with which those cases were directly concerned. Important in this context is the observation that the court below considered and decided only the retroactivity of the *Leary* and *Covington* cases and was presented with no argument concerning the statutes involved in the *Marchetti-Grosso-Haynes* trilogy.

As respects *Leary* and *Covington*, it should be observed that the petition, while citing various conflicting district court and Court of Appeals decisions respecting retroactivity of *Marchetti*, *Grosso* and *Haynes*, points to no such conflict as respects the retroactivity of *Leary* and *Covington*, but points only to a decision identical to that reached by the Court below, in *Rowell* v. *United States*, ... F.2d ..... (No. 19,388, 8 Cir., July 23, 1969). Respondent submits, for the reasons outlined below, that these decisions are correct and should be left undisturbed.

The petition (p. 8) sets forth and relies upon the three criteria for determining retroactivity last enunciated by this Court in *Halliday* v. *United States*, 394 U.S. 831, 832. Applying these criteria to the circumstances of the instant case, it is apparent that the Court below reached the correct results as respects retroactivity of *Leary* and *Covington*.

1. The purpose of the rule.

The purpose of the rule announced in *Leary* is clearly distinguishable and totally different from the type of constitutional rights and privileges denied retroactive application in recent decisions by this Court and of course distinguishable from violations of federal rules as opposed to constitutional provisions. (cf. *Halliday* v. *United States*, 394 U.S. 831). The most significant recent recognition of

Fourth, Fifth and Sixth Amendment rights in the *Escobedo-Miranda* and other cases,* has as their inception, the prophylactic principle of deterring police conduct deemed inconsistent with the Constitution.

A totally different purpose is present in *Leary* and *Covington*, namely that an individual not be convicted on an unconstitutional statute. The government cites no decision, and we find none, where this Court has denied retroactive application to a decision invalidating a federal statute. Surely, if procedural rights affecting the trial require retroactive application (e.g., *Bruton* v. *United States*, 391 U.S. 123, *Roberts* v. *Russell*, 392 U.S. 293), a decision declaring certain statutes unconstitutional should not be denied retroactive application.

2. The extent to which law enforcement authorities have relied upon the old rule.

The contention of the government that law enforcement authorities have relied upon the old rule in numerous cases is deceptive. The criterion here referred to has, as its origin, situations where the police have acted affirmatively in performing their duties (or have neglected to perform certain acts now required of them; e.g. *Miranda*, *Escobedo* and *Alderman*) and cases involving the conduct of trials. (But cf. *Bruton* v. *United States*). Clearly, in these situations what is done cannot be undone, or for that matter, is most situations, redone. No such circumstances exist in the instant case where there are no confessions illegally obtained, no constitutionally defective searches, no illegal admission of co-defendant's statements which would necessitate a new trial. In the instant case the

* *Mapp* v. *Ohio*, 367 U.S. 643; *Alderman* v. *United States*, 394 U.S. 165.

government has simply been allowed to rely passively upon failure of a defendant to act in a given situation — a reliance of no significance as respects retroactivity. In a very real sense, there has therefore been no reliance upon the "old rule".

3. The effect of retroactive application on the administration of justice.

The government observes, in its argument opposing retroactivity, that substantial numbers of persons are serving sentences imposed for pre-*Leary* and pre-*Covington* convictions. Presumably, release of these prisoners would somehow "increase" the burden on the administration of justice. Respondent suggests that precisely the opposite result would flow from retroactivity — the release of prisoners would most certainly *decrease* the burdens of administering the federal prison system, now administered by the Department of Justice.

Also, release of the persons convicted illegally under *Leary* would not result (as it does in *Bruton* situations) in retrial, and would not therefore also increase the burden on the courts.

It is no answer to suggest, as the government does (Petn. p. 11), that hearings would be required to consider the "timeliness" of defendants' reliance on the Fifth Amendment. That argument ignores the very issue the government would have this Court decide, namely, retroactivity, for if *Leary* and *Covington* are applied retroactively, the privilege need not be "timely" asserted. Similarly, waiver would not have to be determined if there is retroactive application, for as observed in the well reasoned opinion below:

> "It is axiomatic that 'unless the defendant is fully aware of a constitutional right, he cannot effectively waive it. *United States* v. *Rosensen*, D.C.E.D. La. 291 F. Supp. 874, 887 (1968)." *Santos* v. *United States*, 417 F.2d at 345.

Clearly respondent could not be held to have waived the constitutionality of the statute pursuant to which he was convicted.

The government's waiver argument also fails to appreciate the distinction between the testimonial privilege against self-incrimination and the non-testimonial privilege. Dealing as we are with the non-testimonial privilege, it is difficult to conceive of a situation where there could be a "knowing and intelligent" waiver — except where defendant complied with the registration requirement and at that time executed a waiver form.

Conclusion

For these reasons, it is respectfully submitted that the court below correctly accorded *Leary* and *Covington* retroactive application and that certiorari be denied.

Respectfully submitted,

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